UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Timothy Keene, individually,	)	
And as next friend to	)	
K. K., a minor,	)	
Plaintiffs	)	
	)	Civil Action
v.	)	File No. 2:07-CV-79
	)	
Daniel Schneider and	)	
Jared Hatch,	)	
Defendants.	)	

MOTION FOR SUMMARY JUDGMENT

Defendants, Daniel Schneider and Jared Hatch, by and through the undersigned counsel, pursuant to Rule 56, Fed.R.Civ.P., move for summary judgment on the complaint against them.

1. Count I of the complaint alleges a violation of 42 U.S.C. § 1983 for the excessive use of force incident to the arrest of Plaintiff (hereinafter, "Keene"), *see* Complaint ¶¶ 8-13. The undisputed facts do not establish an unreasonable use of force under the 4th Amendment, for which reason Defendants are entitled to judgment as a matter of law on Count I. Even were there a disputed question of material fact, Defendants are entitled to qualified immunity, as the undisputed facts do not establish the violation of a clearly established law, nor that it was objectively unreasonable for Defendants to believe that their actions violated such law.

2. Count II asserts that Defendants assaulted and battered Keene, while arresting Keene in Defendants' capacities as officers of the Vermont State Police. *See* Complaint ¶¶ 4, 5, 8, 10, 12, 13 and 21. Defendants are entitled to judgment as a matter of law on Count II, on the same grounds as under Count I.

Memorandum of Law

I. The Force Used to Overcome Keene's Resistance Was Reasonable

The Complaint alleges only that the force used to effect Keene's arrest was excessive, and does not contest the validity of the arrest itself. *See* Complaint at ¶¶ 2, 16, 17. Indeed, Keene ultimately plead guilty to resisting arrest, thereby conceding probable cause for his arrest. Keene deposition at 40. *See DiPilato v. Village of Holley, N.Y.*, 204 WL 2646552 at *2 n. 6 (W.D.N.Y. 2004)(collecting cases); *Decker v. Fish*, 126 F.Supp.2d 342, 347 (D.Vt. 2000).

The use of force is permissible in effecting an arrest. *Graham v. Connor*, 490 U.S. 386, 394-95 (1989). The amount of force permissible is determined by an objectively reasonable standard, viewed through the perspective of a reasonable officer on the scene rather than through hindsight. *Id.* at 396.

There are two separate incidents of force involved in Keene's arrest. First, Trooper Schneider used pepper spray on Keene, after Trooper Schneider advised Keene that he was under arrest and Keene repeatedly refused demands to place his hands behind his back. Keene deposition at 21-22. Keene alleges no lasting injuries from this use of force. Keene deposition at 38.

After the pepper spray failed to secure Keene's compliance, both Trooper Schneider and Detective Hatch used strikes to gain control of Keene's arms while Keene continued to resist their attempts. Keene deposition at 26-27. The strikes were not used until verbal commands and pepper spray both had failed to gain compliance. Even the strikes were ineffective, failing to gain control of Keene's arms for the officers. The officers only secured Keene's arms after either using a pressure point technique (according to the officers), or after Keene finally stopped

fighting based on his daughter's request (according to Keene, who does not recall any pressure point technique). Schneider deposition at 26; Hatch deposition at 12; Keene deposition at 29.

Trooper Schneider did not use an unreasonable amount of force by using pepper spray on Keene. In *Davis v. Callaway*, 2007 WL 1079988 (D.Conn. 2007), the court examined a claim of excessive force based on the use of pepper spray on an arrestee who was pinned to the ground but resisting handcuffing. The court found that the use of pepper spray was not objectively unreasonable, and thus could not sustain a § 1983 claim, even though the plaintiff was not struggling. *Id.* at *6. The three factors noted in *Davis* all apply equally to this case: like Davis, Keene had not been handcuffed at the time he was sprayed; like Davis, Keene had disobeyed police instructions prior to being sprayed; and like Davis, Keene has not claimed any injury beyond the immediate discomfort caused by the spray. *Id.* at *7. Based on those three factors, *Davis* found the officer entitled to summary judgment. *Id.* at *6-7, citing, inter alia, *McLaurin v. New Rochelle Police Officers*, 373 F.Supp.2d 385, 394 (S.D.N.Y. 2005) and *Vinyard v. Wilson*, 311 F.3d 1340, 1348 (11th Cir. 2002). By the same reasoning, Trooper Schneider is entitled to summary judgment for the use of pepper spray.

Similarly, the officers' use of strikes to overcome Keene's resistance were not objectively unreasonable. *See Flanigan v. Town of Colchester*, 171 F.Supp.2d 361, 365-66 (D.Vt. 2001) (finding that circumstances supported amount of force used by officer). In *Flanigan*, the plaintiff actively resisted arrest by stating "no," shaking his hands free of the officer and moving away from him. *Id.* at 365. In the present case, Keene actively resisted arrest by stating "no," and holding his arms under his body, trying as hard as he could not to allow the troopers to pull out his arms for handcuffing. Keene deposition at 26-27. In both cases, the plaintiffs were intoxicated and, thus, their "behavior was likely to be uncontrollable and irrational." *Flanigan*,

171 F.Supp.2d at 365; Keene deposition at 19. And in both cases, the severity of the injuries are not surprising results of a reasonable police response to the arrestee's conduct. In *Flanigan*, the claimant had cuts and scrapes all over his body, muscle aches, and a possible fracture to his right orbital bone. *Id.* at 366. In the present case, Keene had several large bruises on his body, and an undiagnosed pain in his elbow.

Given the fact that Keene continued to resist arrest successfully, despite the strikes employed by the troopers, and that officers are permitted to use a reasonable amount of force to effect an arrest, no reasonable jury could find, based on the undisputed facts, that either Trooper Schneider's or Detective Hatch's use of force in restraining Keene was unreasonable.

II. Defendants are Entitled to Qualified Immunity on Count I

Qualified immunity shields a government official from liability when he or she acts during the course of his employment, even if such acts are unconstitutional, if the official "reasonably misapprehends the law governing the circumstances she confronted." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004), citing *Saucier v. Katz*, 533 U.S. 194, 206 (2001)(qualified immunity operates "to protect officers from the sometimes 'hazy border between excessive and acceptable force'"). If a plaintiff does assert the violation of a constitutional right by an officer in the course of employment, the Court must determine if that right was clearly established at the time of the officer's actions. *Brosseau*, 543 U.S. at 198. Finally, if the right was clearly established, the officer still is entitled to immunity if it was objectively reasonable for the officer to believe that his actions did not violate such law. *Saucier*, 533 U.S. at 205; *Poe v. Leonard*, 282 F.3d 123, 131-32 (2d Cir. 2002).

The determination of whether an official is entitled to qualified immunity is normally a legal issue, to be resolved by the Court well prior to trial. *See Hunter v. Bryant*, 502 U.S. 224,

228 (1991); *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985). "If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation." *Brosseau*, 543 U.S. at 198.

The evidence, viewed in the light most favorable to Keene, does not establish an unreasonable use of force, as set forth in section I., *supra*. Even were the evidence deemed sufficient to state a constitutional violation, Defendants still are entitled to qualified immunity. There are no facts that demonstrate that either Defendant could not reasonably have believed the amount of force used to overcome Plaintiff's resisting arrest was lawful. Since law enforcement officers are permitted to use some degree of force to arrest a suspect, *Graham*, 490 U.S. at 394-95, and the pepper spray was insufficient to subdue Plaintiff, Defendant Schneider objectively was reasonable in believing the use of pepper spray was a lawful amount of force. Similarly, Defendants objectively were reasonable in believing that repeated blows were a lawful amount of force to subdue Plaintiff, who continued resisting arrest after the use of pepper spray. Plaintiff does not allege that either Defendant struck him after he ceased resisting.

The undisputed evidence in this case, that Defendants employed escalating force until successful in overcoming Keene's resistance of arrest, with only minor injuries to Keene, do not demonstrate the violation of a clearly established right of which no reasonable officer could be mistaken. *Brosseau*, 543 U.S. at 199; *Saucier*, 533 U.S. at 206. In fact, this Court's precedent in *Flanigan* compels the opposite conclusion.

Moreover, the officers' use of force was consistent with their training. *See* Hatch deposition at 30; Eastman report at 3-5. An officer is entitled to immunity unless "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. It cannot be clear to an officer that acting in conformity with his

training is unlawful, and it is objectively reasonable for both Defendants to have believed that acting in conformity with their training was lawful. Both Trooper Schneider and Detective Hatch are entitled to immunity.

III. Defendants are Entitled to Qualified Immunity on Count II

The second count also suffers from the same defect as the first count, in failing to allege an objectively unreasonable amount of force, viewed from the perspective of a reasonable police officer on the scene. *See Coll v. Johnson*, 161 Vt. 163, 165 (1993) (adopting the 4th Amendment standard for common law claims asserting excessive force, citing *Graham v. Connor*, 490 U.S. at 397). Alternatively, Defendants are entitled to qualified immunity under Vermont law, under the same standard discussed for Count I. *Murray v. White*, 155 Vt. 621, 626 (1991) (noting that Vermont has adopted the qualified immunity standard announced in *Harlow*).

Conclusion

For the foregoing reasons, Defendants are entitled to judgment in their favor, as a matter of law.

DATED at Montpelier, Vermont this 13th day of August, 2008.

STATE OF VERMONT
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CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed with the Clerk of the Court Defendants' Motion for Summary Judgment using the CM/ECF system, which will send notification of such filing to the following registered participant: Maggie K. Vincent, Esq.

DATED at Montpelier, Vermont this 13th day of August, 2008.

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